THE CASE OF FROST vs. LEIGHTON.

THE subject of "Appeals from Colonial Courts to the King in Council" was treated fully in a paper communicated to the American Historical Association at the meeting held in Washington, December, 1894. The writer of that paper qualifies his title by adding the words "with special reference to Rhode Island." Whatever may be found in the records of our courts, whether in Rhode Island or elsewhere, which will throw light upon contemporaneous views of the courts as to their powers to interpret colonial charters will be welcomed by students of constitutional law. Questions which would compel the exercise of these powers might arise when the appellate jurisdiction of the Privy Council was invoked. There were doubtless many of these cases in which points of this kind were discussed, the records of which would prove of interest to-day if we could see them, but with the exception of a few of the more prominent of them, such for instance as the famous case of Winthrop *vs.* Lechmere, we know but little about cases of this class. When the Supreme Court of the United States reached the conclusion in Marbury *vs.* Madison that Congress had no power to pass the act which conferred upon that Court authority to issue writs of mandamus, it was confronted with the fact that there was no precedent in English jurisprudence for declaring null and void an act which had received the sanction of the law-making powers of the government. There was, however, in the records of the Superior Court of Judicature of the Massachusetts Bay,[1] a decision rendered in 1738 and repeated in 1739, in which the court refused to enforce an order issued by His Majesty in Council, because the powers of the court derived through the charter and the laws passed to carry the same into effect, were in the judgment of the court inadequate for that purpose. An analysis of the two cases will disclose a certain parallelism. The Supreme Court of the United States, interpreting the Constitution, the source of its authority, declared that it could not in the exercise of original jurisdiction issue writs of mandamus, notwithstanding the action of Congress, because no such power was conferred upon the court by that instrument. The Superior Court of Judicature, interpreting in a similar way the Province Charter, and the laws through

[1] Mr. William P. Upham, who is employed in arranging the early Suffolk files, called my attention to the importance of this case.

which they derived their powers, asserted, that notwithstanding the explicit instructions received from His Majesty in Council, they were unable to carry out the royal order, because adequate powers were not conferred upon the court. The circumstances under which this important stand was taken by the Superior Court of Judicature were as follows:

In 1730 a license was granted by the Crown to Ralph Gulston, a London merchant, to enter upon any lands in Maine, the title of which stood in the Crown on October 7, 1691, and to cut down and remove a sufficient number of the trees reserved for the Crown then standing there, to enable him to carry out a certain contract for supplying the royal navy with masts and spars, into which the said Gulston had entered. The right to enter upon the lands in Maine and to cut down trees which was thus granted to Gulston was derived from the charter of William and Mary, in which all trees then standing upon public lands which were two feet in diameter, at the height of twelve inches from the ground, were reserved for the Crown. Before entering upon any lands Gulston was compelled to satisfy himself that the title was in the Crown October 7, 1691, and before cutting any trees he must be prepared to show that they were of the required size at that date. These were questions of fact which were likely to arise in case of litigation in connection with the exercise of the license. The title to the land could readily be proved by the records. The opinion of the Surveyor-General of His Majesty's Woods on the continent of America, after he had "viewed and allowed" the trees which it was proposed to fell, was probably acceptable evidence upon the question of the size of the tree at the time of the grant of the Charter.

Gulston was known in London as a Turkey merchant and was a member of a distinguished family, which traces its pedigree from Sir Ralph Gulston, knighted on the field of Cressy by the Black Prince. One of the descendants, bearing the same name, made a noted art collection which finds mention in works devoted to the history of London. The grandfather of the Turkey merchant was Dean of Chichester, chaplain and almoner of Charles I., and was present with Charles at the time of his execution. The fact that Gulston could secure a contract for furnishing masts and spars to the royal navy is evidence of his influence at court. It does not appear that he came to this country, but the statement is made that he was represented in Boston by Samuel Waldo, who, acting in his behalf, employed William Leighton, of Kittery, to attend to the cutting and loading of the masts under the contract.

In furtherance of this object, Leighton, in the winter of 1733-

1734, organized a gang of choppers and established a logging camp in some woods situated on a farm in Berwick, known as the Caroline farm, the title to which in 1734 was vested in John Frost, of Berwick, but in 1691, at the time when the charter was granted, was in the Crown. Before entering upon the work of cutting down the trees, Leighton procured the services of David Dunbar, Surveyor-General of His Majesty's Woods on the continent of America, to view and allow a certain number of trees, which trees Leighton then proceeded to fell and haul out for shipment. Thus far Leighton was not molested by the owner of the land; but in the spring Frost commenced a suit against him for trespass, the process being made returnable at the Inferior Court of Common Pleas, at the York term to be holden on the first Tuesday of April, 1734. The damages in this suit were laid at £200.

Leighton put in an appearance in the suit through William Shirley, a lawyer of ability, better known perhaps through the fact that he was afterwards for many years governor of the province of the Massachusetts Bay. Shirley in his pleadings admitted the cutting of the trees. He alleged, in bar of the plaintiff's right of action, that these acts were performed under the license granted to Gulston, and set forth in detail various points concerning the question of title and the viewing and allowing of the trees by the Surveyor-General, which if admitted by the plaintiff would have relieved the defendant of the charge of trespass and made the cutting of the trees a lawful act. Shirley evidently expected that the plaintiff would be compelled to join issue by replying or demurring to his plea.

The plaintiff neither replied nor demurred, but left the court to determine how the issue should be settled upon the pleadings as they stood. Shirley was of opinion that the failure of the plaintiff to reply or demur was, under the rules of pleading, an admission of the facts stated in his plea and bar, which statement of facts constituted in his judgment a perfect defence to the action. The court, however, entertained a different opinion, and called upon him to make some other plea. Confident in his legal position, and doubtless influenced by the further fact that by standing upon this point he avoided the submission of his case to a jury, Shirley refused to change his plea, whereupon the court awarded judgment for the plaintiff. The papers in the case do not indicate who represented the plaintiff at this stage of proceedings. Later on the name of Noah Emery appears, and it is probable that he conducted the case from beginning to end. Willis, in a note in his *History of Portland*, pp. 616–617, gives an account of a case in which Emery appeared for the plaintiff and Shirley for the defendant, for which he gives as

authority the "Judge Sewall MSS." From this account I quote the following extract:

"William Shirley, of Boston, afterwards Governor of Massachusetts, for the defendant, filed a special plea; but as special pleading was rarely used in that day and by the practising attorneys of those times little understood, and much less by the Court, the plea was answered by some *ore tenus* observations by the plaintiff's counsel, and the cause went to trial 'somehow or other.'"

Notwithstanding the fact that Judge Sewall, in his description of the case of which he writes, states that the plaintiff was represented by Matthew Livermore, and further that at a later stage in the proceedings he introduces Mr. Auchmuty as counsel for the defendant, neither of whom appeared, so far as we know, in the case of Frost *vs.* Leighton, there can be but little doubt that he referred to the case which we are now considering. Whether this be so or not, the court before which Shirley made his plea in bar was the one of whose knowledge of special pleading the above estimate was made.

From the judgment in the Inferior Court, Shirley appealed to the Superior Court of Judicature. The case was heard in that court in June of the same year, and the judgment of the lower court was affirmed. The language of the court, stripped of technicalities, was that Shirley's plea contained statements of fact and that he ought to have so pleaded as to permit the case to be submitted to a jury.

Execution was promptly issued and the amount of the judgment with costs was collected from Leighton. Shirley then moved for an appeal to the Privy Council, but the court denied his right to do this. The charter conferred upon litigants the right to such appeals where the matter in difference exceeded the value of three hundred pounds. In this case the judgment was for one hundred and twenty-one pounds damage, and four pounds eighteen shillings costs of suit. The defendant was not entitled to an appeal and the court had no power to grant the motion. It did not follow from this that the Privy Council had no power to hear such an appeal, although such evidently was the opinion of the court. From an opinion of the counsel of the Board of Trade given in 1717, we learn that appeals under such circumstances had often been allowed by His Majesty.[1]

Nothing further could be done on this side of the Atlantic. Gulston was not, however, content to submit quietly to this conclu-

[1] Chalmers's *Opinions*, II. 177.

sion of the case. His next move was to invoke the aid of the Duke of Newcastle, who, on the 3d of October, 1734, wrote the governor of the province asking his assistance in the matter. Belcher replied on the 9th of December, stating that he was willing to do all that he could to prevent unjust and vexatious prosecutions of contractors, but that he was powerless to stop the course of the law.

The next step taken was to petition the Privy Council, in the name of Leighton, for a hearing. This petition was granted July 9, 1735. Having secured the right to be heard, Gulston, in the name of Leighton, then filed a petition for a reversal of the judgment in the province courts and for the restoration of the money which had been collected on execution. The matter was referred on the 30th of July, 1735, to the committee for hearing appeals, and on the 2d of April, 1736, they reported recommending by the consent of all parties, as they stated, that the judgments be reversed, that the money collected of Leighton be restored; that the appellant plead anew in the case, suggestions being made by the committee as to a new plea that would overcome the objections raised by the court to the former plea; that in the new trial the evidence be reduced to writing, and that in such trial either party have the right to appeal to the Privy Council. This report was approved by his Majesty in Council, April 29, 1736, and the royal order was issued that it be duly and punctually observed and complied with. The governor and all others whom it might concern were ordered to take notice and govern themselves accordingly.

This order was transmitted to the other side of the Atlantic, but arrived too late to be presented that year at the York session of the Superior Court of Judicature. During the interval between the decision of the court in 1734 and the receipt in Boston of the royal order in the summer of 1736 Shirley had retired from the case, and William Bollan, an attorney of high standing at the Massachusetts bar, had been employed as his successor. This transfer was undoubtedly of a friendly nature, as Bollan, who was an Englishman by birth, came to Boston in company with Shirley and married one of his daughters. .It was evidently thought that it was a mere matter of form to present the royal order and that, by submitting it to the court on the first opportunity, the way would be cleared for reviving the case at the session of the Court of Common Pleas in York in the spring of 1737. With this intent, Bollan appeared before the Superior Court at the September term in Bristol and, after submitting the royal order, moved that execution be issued against Frost for the sum of £125, 18 s., and that the order be complied with and observed in all respects. The court caused the royal

order to be read publicly in court and directed the clerk to enter it upon the records, but deferred further consideration of it to the June sitting of the court at York, in 1737.

On the 22d of June, 1737, Bollan brought the matter up at York and renewed his motion. It is evident that the first intention of the court was to issue a summons to Frost to appear and show cause why he should not comply with the royal order. At any rate, there is a draft of an order of court to that effect entered upon the York docket for that term, which was subsequently crossed out, and a new order was entered that the subject-matter required the most mature consideration and the court would advise thereon until their next sitting. By the next sitting the next term at York was meant. This order therefore postponed the decision for another year.

On the 21st of June, 1738, the hearing upon the motion was renewed, and the court then decided that if the case should come before them a second time in the manner directed in the royal order they would endeavor to do what to justice should appertain, but as to issuing an order for an execution as prayed for, the court having considered the royal charter, together with the laws of the province and the constant usage and practice of the court, were of opinion that they had no authority to give such an order.

The royal order contained three clauses: 1. That both judgments should be reversed. 2. That the money should be restored. 3. That the appellant should be allowed to plead again, and the method suggested in the order was such as to avoid the objections raised to the former plea in the Inferior Court, which objections had been sustained by the Superior Court. In their decision the court made no mention of the first clause, which contained a specific instruction to the court. As to the second, they refused Bollan the only practicable means of enforcing that part of the order. It may, however, be said that no mention was made in the order of the method by which the money was to be restored. In saying, in response to that portion of the order contained in the third clause, that they would do what to justice should appertain if the case should come before them again as directed in the royal order, they were certainly disingenuous. It was impossible that the case should be revived until they should reverse their judgment and send down an order of reversal to the lower court, nor could this well be done so long as the execution in the case stood satisfied of record. The effect of this decision was as conclusive as if the court had said: We positively refuse to obey the royal order. Nearly two years had elapsed since the arrival of the order in this country. Nothing more could be hoped for by Leighton from the courts. Application was,

therefore, made by Bollan to the governor for redress. The petition to the governor recited the various events which had taken place, and was accompanied by the original royal order. In this petition Bollan purposely omitted mention of the council. This body was chosen by the assembly. The reservation of the trees in the New England forests for the royal navy caused much disturbance in the minds of those who owned property the value of which was likely to be affected by the exercise by the Crown of the right of cutting this timber. Complaint upon the subject had become chronic and the subject had aroused discussion. An appointee of the Crown, like the governor, might be expected to sustain the rights of the Crown. Officers elected by the assembly could not be relied upon to assume an attitude in this regard which would be in opposition to the popular feeling. Belcher relieved himself of the responsibility which Bollan sought to impose upon him by referring the matter to the council. On the 14th of September, 1738, that body considered the petition and said that, inasmuch as Leighton had sought a remedy in the courts and had made no application to his Excellency till after the proceedings in the Superior Court, they were of the opinion that it was not proper for his Excellency to do anything in the affair. This decision of the council having been reduced to writing, Belcher on the same day endorsed upon the document a statement that the advice of the council was agreeable to his own sentiments and that he was prevented from doing any service in the affair.

Again the suit was transferred across the ocean, and again the power of the Privy Council was invoked by the contractor to protect his own interests and the rights of the Crown in the forests of New England. A second petition was presented to the council on the 21st of December, 1738, in which there was a prayer for relief and that the order formerly issued by His Majesty in Council might be enforced. All the proceedings which had taken place at the former hearing were recapitulated, and the petitioner set forth the court's delays, the governor's evasion of responsibility, and his own injury, and in forcible language called attention to the damage thereby caused to the authority of the Crown.

The committee to which the consideration of the petition was referred, after having heard counsel in behalf of the petitioner and of the governor, the Council and the Superior Court of Judicature of the Massachusetts Bay, reported that the royal order had not been carried into execution either in whole or in part. The registers of the Privy Council show that there was a report and order February 23, 1738, and a further order March 22, 1738. These are old-style dates, and the year should be 1739, to correspond with

our present system of notation. The second date agrees with the date of the issue of a second royal order, based upon the report of this committee. This order was in substance as follows: 1. That the former order be forthwith and without delay carried into execution. 2. That John Frost do immediately restore to petitioner the money recovered on execution. 3. In case he should refuse to do so, that the Superior Court do take steps to compel him thereto. 4. That the petitioner withdraw his former plea in the Inferior Court and plead in general issue not guilty. 5. The Inferior Court and the Superior Court of Judicature in the province are required to pay due obedience to the former order and likewise to the present order. They are also required to cause this order to be recorded and if they failed to record the former order they are also to have that entered of record.

The second royal order was forwarded to Massachusetts, and Bollan proceeded to lay the foundations for new proceedings before the courts by making a demand upon Frost on the fifth of June for the restoration of the money which had been collected from Leighton on execution and by causing the royal order to be shown to him. Frost refused to pay the money or any part thereof. Bollan then submitted the second order to the inspection of the governor and presented a petition in behalf of Leighton, in which he recited the facts connected with the issue by His Majesty in Council of this order. He alleged that he had shown this order to Frost and demanded the restitution of the money, but Frost had declined to do anything about it. He asserted that it was his intention to appear before the Superior Court at York in June and move for an execution against Frost, so that he might be compelled to restore the money according to the order; and that, at the July term of the Inferior Court of Common Pleas at York, he should move to withdraw his former plea and plead anew according to the order. He should also move to have the orders recorded. He prayed the governor to support His Majesty's authority in the premises and cause His Majesty's aforesaid Order in Council to be without delay and punctually complied with. This petition was received June 11 and was referred to the council June 15. The council voted to recommend the courts, when the application of Leighton and the royal order should be laid before them, to proceed thereon without delay and do that which to law and justice should appertain. The royal order and this answer to the petition were delivered to Bollan the next day.

On the 21st of June the royal order was produced and read in the Superior Court of Judicature, then sitting at York. The clerk made the following endorsement thereon:

"His Ma^{tys} Second Order in Councill, on the Peticion of W^{m} Leighton complaining of the high contempt and disobedience shewn by Gov^{r} Belcher to his Ma^{tys} former order in Councill. This Ord^{r} being produced by Mr Bollan was Read in Court June 21st 1739.

Att^{t} S Tyley Clerk."

The grim humor of this endorsement shows that, even amid the perplexities with which the court was surrounded, there were those who enjoyed the fact that the royal governor of the province shared with the court the embarrassment of the situation.

Bollan presented to the court a memorial and petition founded upon the royal order, praying for an execution against Frost in order that he might, according to the royal order, be compelled to restore the money which had been collected from Leighton on execution. This document is missing from the files, but is described in the opinion of the court. A written answer to this petition was filed by Frost through Noah Emery, his attorney. He objected in the most humble manner to the granting of the motion made by Mr. William Bollan, attorney to the said Leighton, and humbly prayed that nothing in his reasons or objections might be taken as any contempt of His Majesty's royal authority or as wilful disobedience to any of his royal orders, which he was and always had been ready to obey in all things lawful and right as far as he understood them. He would at all times endeavor to do and perform his duty to the King's most excellent Majesty. For reasons why the court ought not to grant the execution he most humbly begged to show that by the charter the General Court of the province had power to establish laws and to constitute courts for trying all manner of causes arising or happening within the province. In personal actions where the matter in difference exceeded the value of three hundred pounds sterling, the party aggrieved by the judgment could appeal to the King in Privy Council. The Superior Court had been duly established by an act of the General Court which had received the royal approbation, and the justices had taken oath to administer the same after the laws and usage of this province. He conceived that this honorable court was not by law impowered to award execution upon the judgment of any other court, but could only do so on the judgment of the court itself, and the order for restoring the money not being the judgment of this court he humbly conceived that the court had not power to grant execution upon the same or by any such way enforce the payment thereof. He humbly conceived that the clause in the royal charter allowing appeals to the Privy Council where the matter in difference exceeded the value of three hundred

pounds meant and intended that no appeal could lie unless the matter in difference exceeded three hundred pounds.[1] If an appeal should be taken from a judgment in some manner not provided for in the charter and not according to the usage of this province, and if the parties made an agreement to have such judgment reversed and the money restored, then the party pretending to be aggrieved could pursue the party at fault in some other manner, but such agreement he conceived was not binding in this court.

Reference has already been made to a case referred to in a note in Willis's *History of Portland*, and the opinion has been expressed that, notwithstanding certain differences between the account given by Judge Sewall and the facts as stated in this narrative, the case referred to is the same. It may be of interest, therefore, to quote what Judge Sewall says concerning the royal order and Emery's answer.

"The order of restitution was addressed to the Superior Court, and Mr. Auchmuty, an able lawyer of Boston, made an earnest application to the court to have the order carried into effect; the court was somewhat perplexed on the occasion, but Mr. Emery, as counsel for the plaintiff, drew up an answer to Mr. Auchmuty's petition, in substance as follows: That the Superior Court of Judicature was a court constituted by the law of the province, whereby they were authorized to hear and determine such civil matters therein mentioned as were made cognizable by them, and to render judgment thereon, and to issue execution pursuant to their own judgment and not otherwise. And if counsel for the defendant in this case had obtained a different judgment from what appeared upon their records he must go there for his execution, as they were not by law empowered to issue any execution contrary to their record of their own judgment. The court were satisfied with this answer and complimented Mr. Emery upon the manner in which he had relieved them from their embarrassment."

Judge Sewall's statement of Emery's point that the court had no power to issue an execution on a foreign judgment is put in more forcible language than that of Emery himself, but the judge entirely omits the argument by which Emery established the point that the judgment was not an original judgment of the Superior Court. If the appeal had been properly entertained by the Privy Council they would have had power to reverse the judgment. The court must, therefore, have adopted Emery's opinion that the language of the

[1] It was not contended by the English lawyers that His Majesty could order a rehearing in every cause. Jurisdiction was essential and it is this point which Emery was discussing. In an opinion given to the Board of Trade by Edward Northey, December 19, 1717, he said: "His Majesty cannot, by law, give a direction to any court for to rehear any cause depending therein, but rehearings are granted or denied by Courts of Equity, on petition of the parties grieved, to such court as shall be judged proper." Chalmers's *Opinions*, II. 177.

charter meant that no appeal could lie unless the matter in difference between the parties exceeded three hundred pounds in value, or they would not have pronounced, as they did on the twenty-sixth of June, the following decision:

"The court now taking into their serious consideration the said Memorial and Petition together with the answer of Noah Emery Attorney at Law in behalf of the sd Jno Frost are of opinion, That they have no authority by any Law of this province, or usage of this Court to order such an Execution. And the Provision made in the Royal Charter respecting appeals to his Majesty in Council, does not as they apprehend, warrant any such Execution but points to a method of another nature in all appeals to be made conformable to the sd Charter. This was, in effect the Judgm^t^ of this Court when they sat in this County the last year, upon a motion made by the sd William Bollan in behalf of the sd William Leighton to the same purpose upon an order of His Majesty in Council dated the 29th of April 1736; And the Justices of this Court now present, see no reason to depart from that opinion.

As to the said John Frosts bringing on a Review, or an action de novo, that so the said William Leighton may withdraw his former plea and plead the General Issue &c. By the Constitution of the Courts of Justice in this Province, the Action must begin first at an Inferior Court, and so come to this Court by appeal, and the Justices of this Court, when such appeal comes regularly before them will unquestionably endeavor that Justice be done between the sd Leighton and Frost.

And as to putting the Royal Order before mentioned upon the Records of this Court,

It appears by the Clerks minutes, That the Justices of this Court receiving the first order, gave express direction for Recording the same, and were surprised to find it was omitted, and they have now commanded that both the Royal Orders be forthwith Recorded, and we shall take effectual care that the same be accordingly done.

In the name and by order of Court,

Samuel Tyley, Cler."

It may be inferred from the last point made by Emery and also from the statement in the report of the committee of the Privy Council, that there commendations which they made were by the consent of all parties, that Frost's representative before the Privy Council had made some agreement that he, Frost, would abide by the result. If any such agreement existed it did not trouble the court. No reference is made in the decision to that point in Emery's argument.

No further attempts were made by Bollan to enforce the royal order through the agency of the Superior Court of Judicature. He had, however, notified the governor that he should move the Inferior Court of Common Pleas at the York term in July for permission to

plead anew in the case. The royal order required that court to enter the order upon their records and to allow the case to be opened again, and it was important for Bollan if he wished to follow the matter beyond this point that he should carry the matter before the Inferior Court. The original royal order had been filed with the clerk of the Superior Court. On the same day on which the decision of that court was rendered Bollan asked for the privilege of removing the order from the files of the court in order that he might exhibit it at the next sitting of the Inferior Court for the county of York. This was granted him on his promise that he would return the same to the clerk so that it might be recorded as the court had directed. At the July term of the Inferior Court the royal order was read and the clerk was instructed to record it. There the case practically ended. As it had been taken from the Inferior Court by appeal and had not been restored to their docket by the Superior Court, there was no way in which that court could have complied with a motion to reopen it, and it does not appear by the record that any such motion was made.

Once again mention is made of the case in the records of the Superior Court. On the 19th of October, 1743, the justices of that court received a letter from Governor Shirley, accompanied by copies of the two royal orders. In this letter the governor complained that to that day the orders had not been carried into execution. The court thereupon gave orders to the clerk to prepare a draught of a summons or other process to notify the said John Frost, the party concerned, to show cause why the order of the King in Council so far as concerned him had not been complied with, etc., and to lay the said draught before the justices of the said court that so they might do what was proper thereupon.

The clerk of the court had, in his endorsement upon the royal order, concentrated upon the head of Governor Belcher all of the contumely directed against the court, the governor and the council, and now the justices of the court, when called upon to carry out the order, contented themselves with ordering a summons to Frost to be draughted, so that he might show why he had not obeyed the order. It is doubtful if even this perfunctory recognition of the governor's complaint was ever actually performed.

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